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No. 73-179

In the Supreme Court of the United States

OCTOBER TERM, 1973

ESTYNE WEST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (1) that certain evidence, although promptly stricken by the court, irretrievably prejudiced her, (2) that parts of a conversation in which she engaged, overheard by a narcotics agent, should not have been admitted in evidence, (3) that evidence admitted on rebuttal was prejudicial, and (4) that improper arguments were made in the government's summation.

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of possessing with intent to distribute 11.9 grams of cocaine, in violation of 21 U.S.C.

812, 841(a)(1) and 841(b)(1)(A). She was sentenced to imprisonment for one year, to be followed by a special parole term of three years. The court of appeals affirmed *per curiam*.

On March 6, 1972, at about 8:00 p.m., narcotics agents went to petitioner's Manhattan apartment to execute a search warrant. One of the agents knocked and asked for "Joel", the name of petitioner's husband. A voice answered, "I don't know any Joel." Some conversation inside the apartment was heard (Tr. 25–26, 88–90). In order to avoid a forced entry, the agents awaited the departure of the male guest (one Sheldon Bloom). During the wait, Agent Hall listened to the conversation between petitioner and Bloom. He heard "cocaine" mentioned several times (Tr. 24–29, 87–88, 157–157A). After several hours' wait, during which Bloom failed to leave, a ladder was obtained from a neighboring fire station and thrown up against the house, and two agents entered through a dining room window (Tr. 120–122, 158, 201–202). Petitioner was seen to throw an object out of another window. She then said to her guest, "they can't do anything to us now." The object was a glass, which shattered when it struck the ground. It held a plastic envelope containing what proved to be 11.9 grams of nearly pure cocaine (Tr. 122–123, 160–161, 202). Petitioner and Bloom, now deceased, were placed under arrest. Execution of the search warrant turned up a quantity of benzocaine, a non-prohibited substance used in diluting cocaine for the retail market (Tr. 32, 35, 73–79, 101, 123,

162–163). Petitioner stated that she did not use drugs (Tr. 37, 70, 270–271, 341).

1. Petitioner places particular stress upon the claim that she was prejudiced by the following occurrence during direct examination of Agent Hall regarding the dilutant found incident to the search warrant (Tr. 78–79):

> Q. Mr. Hall, I show you Government's Exhibits 3–A, 3–B and 3–C for identification and ask you whether you can identify them?
>
> A. Yes, Sir, I can. Exhibit 3–A is the lock-sealed evidence envelope in which the cocaine, Exhibit 3–C was submitted to the Bureau of Narcotics and Dangerous Drugs' Chemist and the reason I know this—
>
> Miss GERLING: I object to the testimony of cocaine unless the witness is qualified as an expert.
>
> Mr. FELD: Your Honor——
>
> The COURT: Well, at this time I will strike out the description of that substance and, of course, if the Government is not able to eventually adduce any evidence that indicates something or other about that description, that will end the case. But we will strike it out now and the jury will disregard it.
>
> Mr. FELD: The Government is not claiming——
>
> The COURT: I don't care what you are claiming. I am striking that testimony.

There is no merit to the petitioner's contention that she was denied a fair trial because Agent Hall accidentally and inaccurately referred to Exhibit 3-C as cocaine, when in fact it was benzocaine. When this statement was made, defense counsel objected, the

testimony was immediately stricken, and the district court promptly instructed the jury to disregard it (Tr. 79). Under these circumstances, no prejudice could have resulted from this testimony, and the error was unquestionably harmless. *Chapman* v. *California*, 386 U.S. 18, 24.[1]

Immediately following the district court's instruction to strike the description of the exhibit, Agent Hall was asked whether he could identify the exhibit. He candidly stated, "I initialed it up here but it is faded" (Tr. 79). As a result, the Government did not offer this exhibit, which contained approximately 44 grams of benzocaine seized in the defendant's apartment, because Hall's inability to identify his initials on the exhibit [1a] precluded establishing the necessary chain of custody.[2]

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[1] Petitioner's counsel made no effort by her interrogation of the witness or by a stipulation to correct the misstatement. (The prosecutor was obviously attempting to correct the error, but was interrupted by the district judge.)

[1a] Petitioner chooses to attack Hall's credibility here, as she did below, by emphasizing that the laboratory report relating to Exhibit 3-C mentions that the exhibit was initialed by Agent Diez and witnessed by Agent Shay (Pet. 11). The argument is frivolous. First, the laboratory report specifically mentions that this evidence was seized by Agent Hall. The agent who seizes the evidence customarily initials it. Second, petitioner ignores the fact that Hall identified his initials on the two plastic bags containing 437.30 grams of benzocaine (GX 1-C, 1-D), which he also seized at the defendant's apartment and which were admitted into evidence (Tr. 74). The laboratory report concerning these exhibits makes no reference to his initials being on them. In sum, the laboratory report does not purport to contain an exhaustive list of the persons whose initials appear on the evidence and does not serve to refute Hall's testimony.

[2] Had the chain of custody been established, the benzocaine

Petitioner also argues that the prosecutor improperly conveyed the impression to the jury that the exhibit (GX 3–C) was cocaine (Pet. 13). The sole asserted basis for this speculative allegation is petitioner's strained interpretation of a statement from the summation:

> Is Agent Hall a liar? * * * Do you remember when he was on the witness stand I had a bag of white powder and I asked him to take a look at the bag of white power and see if he could identify it.
>
> He was looking at the bag of powder looking for his initials on it. He said I think these are my initials but they are blurred and I can't say whether they are or not. The government didn't offer that bag of white powder. He could have said, sure, these are my initials, they are blurred and I can identify it and get it into evidence, but he didn't do that. [Tr. 404–405.]

The challenged argument was wholly proper, as the district court recognized when it overruled the objection to it (Tr. 405).

First, the government had no reason to suggest to the jury that there was more cocaine involved in this case than the 11.9 grams charged in the indictment, and petitioner's assertions to the contrary are completely unsupported by the record. Indeed, at the outset of his summation, the prosecutor emphasized that the case was "not about a lot of cocaine" and unequivocally told the jury: "The ultimate issue in this case

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and boric acid (GX 3-C), admittedly a diluting agent for cocaine, would have been admissible on the issue of whether the defendant intended to distribute the 11.9 grams of cocaine.

is a very simple one: did the defendant possess this cocaine [GX 4–C] with intent to distribute it?" (Tr. 398).

Second, it is perfectly clear that the challenged statement, when examined in context, was wholly proper. In her summation, defense counsel had repeatedly charged that the government's witnesses, especially Agent Hall, had lied and had fabricated the evidence upon which the government's case was based (Tr. 375, 380, 382, 386, 389–390). In the face of petitioner's claim that Agent Hall had testified falsely, it was certainly appropriate for the government to remind the jury of Hall's candor and truthfulness in testimony about the blurred initials on GX 3-C.

2. Petitioner urges that the trial court erred in receiving Agent Hall's rebuttal testimony with respect to petitioner's statements regarding the true nature of her conversation with Sheldon Bloom on the night of their arrest. This claim is without merit.

Contrary to petitioner's claim, the subject of the explanation for the petitioner's meeting with Bloom on the night in question was first injected into the case on the defendant's direct examination, when she affirmatively stated that he was present at her apartment to discuss her African opera venture.[3]

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[3] The relevant testimony was as follows:

"Q. Did you have an appointment that night to meet somebody. A. Yes, I did.

"Q. Who did you have an appointment to meet? A. Shelly Blume [sic].

"Q. What did you have any [sic] appointment to meet him in regard to? A. The Lost Fisherman Opera. I had a can of film there that I spent my money on and I also had a sound

Furthermore, she denied on direct examination that any of their discussion concerned cocaine and claimed that the word cocaine was never mentioned (Tr. 314–315).[4]

Agent Hall's rebuttal testimony was introduced to refute petitioner's testimony about her reason for meeting with Bloom. When defense counsel objected, the district court ruled: "This seems to me to be entirely valid testimony, discrediting, if it is believed by the jury, her story of what she and Mr. Bloom were discussing * * *" (Tr. 352–353).

The law is well established that rebuttal evidence may be introduced to refute evidence on material issues of fact, whether elicited on direct or cross-examination, as well as to refute evidence on collateral issues of fact elicited on direct examination. *Walder* v. *United States,* 347 U.S. 62, 65; *United States* v. *Hiss,* 185 F. 2d 822, 832 (C.A. 2), certiorari denied, 340 U.S. 948; *United States* v. *Johnson,* 208 F. 2d 404, 406 (C.A. 2), certiorari denied, 347 U.S. 928; *Sullivan* v. *United States,* 411 F. 2d 556, 558 (C.A. 10).[5]

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track and they weren't synchronized. I was trying to talk him into synchronizing it and to raise the money to bring it over.

"Q. You had to have money, in other words, to raise finances? A. Yes, because he had access to machinery amongst other things—" (Tr. 313).

[4] On cross-examination, the defendant elaborated in detail the alleged discussion with Bloom concerning the African opera company venture (Tr. 335–336). When asked about the purpose of the meeting, she stated: "For me, to get some money from Mr. Shelly Bloom for this project. That was the purpose" (Tr. 337). She reiterated her denial that the word cocaine was mentioned during the conversation (Tr. 337).

[5] Petitioner alleges for the first time in her petition for certiorari that her conversation with Bloom—which Hall related

The rebuttal testimony here is distinguishable from the situation in *United States* v. *Beno*, 324 F.2d 582 (C.A. 2), upon which petitioner heavily relies. In *Beno*, a prosecution against an Internal Revenue Agent for having solicited and received an encyclopedia and dictionary in violation of 18 U.S.C. 202, the court of appeals reversed the conviction because the trial court had admitted voluminous testimony on a host of specific, collateral acts of the defendant, including the preparation of tax returns in violation of IRS rules, an arrest for reckless driving, and threats by the defendant to investigate the tax records of the police. By contrast, the rebuttal in this case was limited to discrediting the petitioner's false testimony on direct examination with respect to facts directly involved in the events out of which this indictment arose. See *United States* v. *Cuadrado*, 413 F.2d 633, 635 (C.A. 2); *United States* v. *Keilly*, 445 F.2d 1285, 1289 (C.A. 2), certiorari denied, 406 U.S. 962.[6]

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on rebuttal—was improperly overheard by him in the hallway. She alleges "a justifiable and constitutionally protected expectation that her conversation was private" (Pet. 25). This claim is frivolous. Petitioner had no expectation that a conversation which was loud enough to be overheard in the hallway was "private". The rationale of *United States* v. *White*, 401 U.S. 745, upon which petitioner relies, clearly sustains the admissibility of this evidence. In any event, since petitioner did not raise this issue below, she may not raise the issue here. *Segurola* v. *United States*, 275 U.S. 106, 111–112.

[6] It is true, as petitioner asserts, that no instruction was given to the jury concerning the rebuttal testimony at the time it was introduced. No such instruction, however, was requested, nor did the defense object to the charge on this ground. The absence of such an instruction under these circumstances does not warrant reversal.

3. During summation, the prosecutor stated: "March 23rd Shelly Bloom dies. Shelly Bloom who might have been a key government witness in this case * * * " (Tr. 403). Defense counsel immediately objected. Judge Frankel sustained the objection and instructed the jury to disregard this remark, stating:

> * * * I definitely sustain your objection. The jury will disregard that remark. They are not to speculate about what dead people might or might not have been [Tr. 403].

Petitioner contends that the remark concerning Bloom requires reversal of her conviction, notwithstanding the trial judge's ruling striking the remark and the prompt cautionary instruction to the jury, because the evidence against the defendant was allegedly tenuous.[7] This argument is without merit.

The evidence against petitioner was in fact compelling. The proof showed that petitioner had thrown an object out of her window which held a plastic bag containing 11.9 grams of almost pure cocaine. The cocaine, if diluted, had a retail value of $2,000 (Tr. 81). A search of petitioner's apartment revealed large quantities of benzocaine, which she admitted were "cutting materials." Before and during the trial, she denied that she was a user of cocaine. Following her arrest, petitioner admitted that it was she who had thrown the cocaine out of the window. Moreover, petitioner's false

[7] In her motion for a new trial, petitioner challenged the remark concerning Bloom on the ground that the jury might have attributed his death to the petitioner. This ground of attack appears to have been abandoned on appeal because of its obviously frivolous nature.

exculpatory statement that it was Bloom who had thrown the cocaine was further evidence of guilt.[8]

Even assuming that the remark concerning Bloom was ill-advised, it was a single, isolated utterance during the government's summation. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 242; *United States* v. *Tortora*, 464 F. 2d 1202, 1207 (C.A. 2); *United States* v. *Ramos*, 268 F. 2d 878, 880 (C.A. 2). Any possible prejudice which might have accrued from this remark was largely countered by the steps taken: objection was promptly made, and the jury was immediately instructed to disregard the remark. See *Gaither* v. *United States*, 413 F. 2d 1061, 1080 (C.A.D.C.).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

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[8] Although petitioner alleges that the proof against her was "tenuous," she does not challenge the sufficiency of the evidence to support the verdict. The verdict was amply sustained by the evidence, as the trial judge ruled in denying petitioner's motion for a new trial (Tr. 21–23, February 26, 1973).

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